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No. 89-1835

In The

Supreme Court of the United States

October Term 1989

KELVIN H. KEITH,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PAN AMERICAN WORLD AIRWAYS, INC., CERTAIN CLAIMANTS, MORGAN D. KING,

Respondents.

MORGAN D. KING'S RESPONSE IN SUPPORT OF KELVIN H. KEITH'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I.

QUESTIONS PRESENTED FOR REVIEW

A. Does the Age Discrimination in Employment Act ("ADEA") grant the Equal Opportunity Employment Commission ("EEOC") the absolute right to preclude absent class members from participating in an EEOC-sponsored backpay settlement fund?

B. Can the EEOC prevent a class member from participating in a backpay settlement fund when the class member requests inclusion in the settlement class prior to judicial approval of the consent decree which establishes the fund?

C. Must notice to the class in an EEOC-sponsored ADEA enforcement action conform to the requirements of constitutional due process?

D. Is a settlement agreement in a representative action fundamentally fair and just when it affords the defendants classwide relief but permits only certain claimants to share in the settlement fund while excluding other claimants with identical claims?

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II.

STATEMENT OF THE CASE

On September 15, 1981, the EEOC filed suit in the Northern District of California against Pan American World Airways, Inc. ("PAN AM") pursuant to Section 7(b) of the ADEA, 29 U.S.C. Section 626(b) and Sections 6(c) and 17 of the Fair Labor Standards Act, 29 U.S.C. Sections 216(c) and 217. The EEOC sought relief on behalf of two named individuals and on behalf of *"all persons* who would have remained in Pan Am's employment in a flight engineer position past the age of 60, but for Pan Am's refusal to employ those persons after they reached the age of 60." (Clerk's Record ("R") 1 (emphasis added).) Although Captain MORGAN D. KING ("KING") was identified as a member of the class, *no* notice of the proceeding was ever mailed to him.

After two proposed consent decrees failed to win court approval, PAN AM, the EEOC, and certain amicus curiae claimants proposed a third consent decree. PAN AM agreed to pay $17.2 million to the pilot class and up to $1 million in attorneys' fees and costs. In return, all of the age discrimination claims, *including those of the 423 absent class members,* were to be dismissed with prejudice. As a result, only 106 claimants were given the right to share in the settlement proceeds. None of the 423 absent class members were represented in the settlement discussions while all of their class rights were bargained away. (R 810.)

The District Court approved this consent decree over the timely objections of KING, KELVIN H. KEITH ("KEITH") and six other pilots who argued that it was

unfair to exclude them from the settlement class while extinguishing their claims against PAN AM. (R 810.) The Ninth Circuit affirmed the District Court's order and judgment, holding that "the consent decree does not in fact prejudice any rights [the objectors] have under the ADEA. . . . [because] an individual employee's right to bring a private ADEA action terminates upon the EEOC's commencement of an enforcement action on his behalf." (KEITH's Appendix ("A") 47.)

Respondent KING respectfully submits that the opinion of United States Court of Appeals for the Ninth Circuit conflicts with decisions of this Court and other United States Courts of Appeals. KING files this response in support of KEITH's Petition for a Writ of Certiorari.

III.
SUMMARY OF ARGUMENT

Section 7(c)(1) of the ADEA terminates private rights of action when the EEOC brings its own action "to enforce the right[s] of such employee[s]." The Ninth Circuit's determination that Section 7(c)(1) operates to cut off *all* rights of the aggrieved employees is without precedent. Congress intended to preclude a mulitiplicity of lawsuits, not *all* rights in connection with a negotiated consent decree. Thus, only KING's private right of action has been precluded by the ADEA, not his rights in the EEOC enforcement action. Neither the ADEA nor the United States Constitution permits the EEOC to arbitrarily, without prior notice, extinguish individual rights in a representative action.

Although an EEOC enforcement action is not a Rule 23 class action, the EEOC, like any other litigant seeking to represent the interests of absent class members, has an obligation to represent the absent class members fairly and adequately and to provide constitutionally sufficient notice to class members about the lawsuit. Where, as here, the EEOC does not mail notice to known class members, it cannot bar such persons from later participating in the suit; moreover, so long as absent class members have valid claims, they cannot be precluded from seeking inclusion in an EEOC-sponsored backpay settlement fund if they request inclusion in the settlement class before any court ordered bar date and prior to the entry of judgment.

A settlement agreement or a consent decree, like the one approved here, which arbitrarily permits certain claimants to share in a settlement fund while excluding other claimants with identical claims cannot be fair, adequate or just. The decision of the United States Court of Appeals is manifestly unjust to KING and the other absent pilots. The EEOC's expedient attempt to preclude KING and the other absent pilots from sharing in the backpay settlement fund must be rejected.

IV.

ARGUMENT

A. Summary of Material Facts.

KING was hired by PAN AM on October 28, 1946 and served as a pilot for 33 years. Having attained the rank of captain, KING worked as a 747 pilot. Because federal

regulations prohibit persons from serving as 747 pilots after reaching the age of 60, KING knew that he could not continue to work as a pilot for all his productive employment years. Nothing in the law, however, prohibited (or prohibits) persons age 60 and older from working as flight engineers in the 747 cockpit. Rather, persons with 30 or more years of flying experience are valuable members of the crew. As KING approached the age of 60, his health was good, and he desired to continue working in the environment he knew best: the 747 cockpit. (R 739.)

Prior to KING's 60th birthday, he submitted a bid to PAN AM for an award of B747 flight engineer. In response to KING's bid, on November 14, 1979, PAN AM wrote to KING: "This is to notify you that you have been awarded B747 flight engineer. . . . "; but PAN AM told KING that he could not fill the flight engineer position because he would be removed from the pilot seniority list as of his 60th birthday. (R 739.)

As a result of PAN AM's wrongful refusal to allow KING to fill the flight engineer position, KING retired. After his retirement, PAN AM corresponded with KING and regularly mailed his pension benefits to his residence address. (R 739.)

On September 15, 1981, the EEOC brought an action against PAN AM for age discrimination, seeking relief on behalf of a class of pilots who had been precluded from serving as flight engineers after reaching the age of 60. (See R 1.) In June, 1982, the EEOC requested a list of pilots from PAN AM so that the EEOC could identify and notify all airmen who qualified for inclusion in the lawsuit. (R 770.) PAN AM informed the EEOC that KING was

a potential claimant, but inexplicably failed to provide any address for KING even though his address was known to the Company. Remarkably, the EEOC never asked PAN AM or anyone else for KING's address and made no "affirmative effort" to locate him. (R 770.) PAN AM's list provided addresses for only 445 of the 514 pilots designated. (R 755.)

After two proposed consent decrees failed to win court approval, on February 3, 1988, PAN AM, the EEOC, and the litigating amicus curiae claimants reached a proposed settlement which created a backpay fund of $17.2 million and which contained enforcement provisions that would prevent PAN AM from continuing its discriminatory practices. The settlement agreement purported to dismiss with prejudice the claims of at least 514 employees subject to the class definition, while permitting only 106 claimants within the class definition to share in the settlement fund.

The settlement generated widespread publicity, and KING, KEITH, and six other objector pilots read about the settlement in newspaper reports. On March 3, 1987, in accord with the District Court's order Setting Fairness Hearing and Briefing Schedule, KING filed a timely request for intervention and inclusion in the settlement class and a timely objection to the settlement. (R 738, 739.)

Following the fairness hearing, the District Court approved the settlement agreement and consent decree and denied KING's request for inclusion in the settlement class by written order dated June 17, 1988. The Court found that although PAN AM did not mail notice to

KING (A 91, 121), KING "knew of the lawsuit by other means." (A 121-122.) Both KEITH and KING filed timely appeals. On March 2, 1990, the United States Court of Appeals for the Ninth Circuit affirmed the order approving the settlement and consent decree and designated the opinion for publication in the Federal Reporter, Second Series. (A 1-66.)

B. The ADEA Precludes Private Rights of Action While Promoting the Enforcement of Individual Rights in EEOC Actions.

The Court of Appeals determined that " . . . the consent decree does not in fact prejudice any rights [the objectors] have under the ADEA. . . . " because Section 7(c)(1) of the ADEA provides that private rights of action terminate upon the commencement of an action by the EEOC. Thus, according to the Court of Appeals, KING's rights and KEITH's rights as individuals were terminated on September 15, 1981, when the EEOC filed a complaint on their behalf. (A 47-48.)

The Ninth Circuit misses the point. Section 7(c)(1) provides that private rights of action terminate only when the EEOC brings an action "to *enforce* the right[s] of . . . employee[s]." ADEA Section 7(c)(1) (emphasis added). While Congress precluded a multiplicity of actions, nothing in the law suggests that Congress intended to preclude any aggrieved employee from sharing in a settlement fund within the EEOC action. To the contrary, Congress plainly intended that the EEOC would undertake the duty to represent those employees on

whose behalf the action is brought to enforce their rights – not cut them off.

It is well settled that the EEOC cannot cut off the rights of absent class members in connection with Title VII actions. *General Telephone Company of the Northwest, Inc. v. Equal Employment Opportunity Commission*, 446 U.S. 318, 100 S.Ct. 1968 (1980). The Ninth Circuit's conclusion that *General Telephone, supra,* is inapposite because it involves a Title VII action (A 57 at note 11) is simply wrong. "The statutes [Title VII and the ADEA] share similar aims and substantive prohibitions – the elimination of arbitrary discrimination in the workplace." *Sutton v. Atlantic Richfield Company*, 646 F.2d 407, 411 (9th Cir. 1981). "[T]he ADEA is remedial and humanitarian legislation which should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment." *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, 193 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978). Although there may be minor differences in the statutory language, Congress certainly did not intend that absent ADEA class members would be treated differently from absent Title VII class members in connection with backpay recoveries.

Even if Congress intended to grant the EEOC the power to arbitrarily terminate an aggrieved employee's right to share in a backpay settlement fund, it could not do so constitutionally. The EEOC cannot wrongfully effectuate "a taking of property without that procedural due process that is required by the Fourteenth Amendment." See *Sniadach v. Family Finance Corp. of Bayview*, 395 U.S. 337, 339, 89 S.Ct. 1820 (1969). Thus, the Court of Appeals' statutory construction provides the EEOC with

unwarranted, unconstitutional and unbridled discretion to determine which employees are eligible to share in backpay settlements. This Court, not the Court of Appeals, should decide if the EEOC must act within limits.

C. The EEOC Must Provide Constitutionally Sufficient Notice Before Cutting off the Rights of Absent Class Members.

While EEOC enforcement actions are not subject to Federal Rule of Civil Procedure Rule 23, the EEOC must nevertheless provide absent parties constitutional due process in connection with representative actions. No judgment can bind absent parties, under any rule of civil procedure, unless (1) it is through a class or representative suit, and (2) the procedure adopted satisfies constitutional due process. *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115 (1940); *Martin v. Wilks*, ___ U.S. ___, 109 S.Ct. 2180 (1989).

Notice in a representative action takes on different forms, depending upon the purpose of the notice and the type of action. In the typical (and favored) "opt-out" class, the notice apprises potential class members that if they do nothing, their rights *will* be adjudicated as part of the class. In the less favored, "opt-in" litigation, the notice apprises individuals that unless they opt into the litigation, their rights *will not* be adjudicated.

In this case, however, the EEOC purports to have intended to extinguish the claims of all parties who did not actively participate in the EEOC litigation, thus creating a new "opt in or else" class. Assuming, *arguendo*, that

such a class is constitutionally permissible, a class member's rights in the class could only be extinguished through constitutionally sufficient notice. The Court of Appeals' conclusion that the EEOC can unilaterally and arbitrarily terminate a class member's right to participate in a class settlement fund without prior notice and opportunity to be heard is simply wrong:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citations omitted.]
>
> . . . .
>
> This right . . . has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce of contest. [Citation omitted.]

Schroeder v. City of New York, 371 U.S. 208, 211-212, 83 S.Ct. 279 (1962).

Thus, KING and the other pilots were entitled to constitutionally sufficient notice of the proceedings before their claims could be extinguished.

PAN AM knew KING's address and the addresses of the other absent pilots, and the EEOC could have obtained these addresses upon reasonable inquiry. KING and 68 other pilots were improperly left off the mailing list:

> Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318, 70 S.Ct. 652 (1950).

As in *Mullane*, there was no reason for resorting to means less likely than a first class letter to apprise KING and the other pilots of their rights. Word of mouth and articles in newsletters were not sufficient. The EEOC should have mailed a first-class letter to KING and the other pilots to provide them an opportunity to participate in the litigation and to notify them that their claims would otherwise be extinguished.

The finding by the District Court, that KING had heard of the lawsuit is irrelevant. The District Court should have made only two inquiries: (1) whether the parties knew KING's name and address, and (2) whether the parties mailed KING a notice accurately "describ[ing] the action and [KING's] rights in it." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S.Ct. 2965 (1985). Having answered the first inquiry in the affirmative and the second inquiry in the negative, no further inquiry was relevant: KING should have been allowed to participate in the settlement fund.

Mullane, supra, establishes one of the few "bright lines" in the field; it was clearly erroneous for the District Court to inquire about other means of communication which were necessarily less likely to apprise KING of the pendency of the action. In *McClain v. Wagner Electric Corp.* 550 F.2d 1115 (8th Cir. 1977), the court held:

> the Commission had no right to undertake to cut off the claims of individual employees or former employees without their knowledge or consent. . . . [I]t appears to us that in ordinary fairness the Commission owes some duty to

> employees to advise them of agency actions which may substantially and perhaps adversely effect their rights, and in that connection to work out an effective notice policy.

Id. at 1120-1121, 1122. This Court should require no less.

In *Hoffman-La Roche, Inc. v. Sperling*, ___ U.S. ___, 110 S.Ct. 482 (1989), this Court held that a district court may properly supervise notice to absent class members in ADEA enforcement actions. Judicial scrutiny is not a constitutional prerequisite, but it is preferred. It has the following practical effects:

(1) The parties and the court are required to think about the fairness and adequacy of the notice;

(2) The notice is codified by a court order which usually includes time deadlines; and

(3) After the notice is mailed, proof of service is filed.

Had the EEOC been subjected to judicially supervised notice, it no doubt would have made the minimal effort required to obtain the addresses of all of the absent pilots, including KING; moreover, the notice would have more adequately apprised the class members that the EEOC intended to extinguish their rights if they did not come forward to participate in the litigation. As it is, the EEOC abysmally failed to provide KING with any notice.

D. An Absent Class Member has the Right to Request Inclusion in an EEOC Backpay Settlement Fund at any Time Prior to Entry of Judgment.

KING moved for inclusion in the Settlement Class before any determination of the propriety of the settlement had been made and before any bar date for filing

proofs of claim had been set; nevertheless, his motion for inclusion was denied. A class member's right to file a claim in a classwide settlement is so basic that courts rarely are called upon to settle the law. Nevertheless, the Fifth Circuit has addressed this issue head on:

> We hold that the ability of subclass members to opt into a backpay settlement may not be terminated before a final determination of the propriety of that settlement is made.

Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1221 (5th Cir. 1978).

Since KING's motion for inclusion was made before the District Court even considered the Settlement's fairness, the court could not fairly deny KING's inclusion request. The court's discretion was strictly limited to adjudication of the following issues: (1) could KING prove that he fits within the class definition and (2) was KING seeking a double recovery. No other inquiry was relevant.

The District Court's conclusion, supported by the Court of Appeals, that KING's earlier undefined knowledge about the litigation was sufficient to deny inclusion, contravenes established precedent:

> Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection.

Phillips Petroleum v. Shutts, supra, at 810.

Unnamed class members need not intervene or file protective motions during the course of litigation to

guard against the possibility that the named representatives might not represent their interests. *United Airlines v. MacDonald*, 432 U.S. 385, 97 S.Ct. 2464 (1977).

"Therefore, the time that the would-be intervenor first became aware of the pendency of the case is not relevant to the issue of whether his application was timely." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977). In *Martin v. Wilks, supra*, this Court reaffirmed the proposition that knowledge about pending litigation is not sufficient to require immediate intervention:

> And even under a regime of mandatory intervention, parties who did have adequate knowledge of the suit would relitigate issues. Additional questions about the adequacy and timeless of knowledge would inevitably crop up. We think that the system of joinder presently contemplated by the Rules best serves the many interests involved in the run of litigated cases, including cases like the present one.

Id. at 2187. Thus, King had no duty to come forward sooner. Absent specific notice to KING that the EEOC would no longer represent his interests, he had the right to allow the litigation to run its course. He should have been permitted to participate in the settlement fund.

E. The Settlement Agreement Is Not Fair, Adequate and Just Because It Provides Classwide Releases to Defendant but Arbitrarily Permits only Certain Claimants to Share in the Settlement Fund While Excluding Other Claimants with Identical Claims.

Class settlements and approvals of proposed consent decrees are subject to the universally applied standard of "whether the settlement is fundamentally fair, adequate

and reasonable." *Officers for Justice v. Civil Service Commission of the City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). KING has never quarrelled with the adequacy of the $17.2 million settlement fund or the appropriateness of the settlement enforcement provisions; rather, KING objects to the consent decree because it purports to fully and finally extinguish KING's claims and the claims of all absent class members while precluding them from sharing in the settlement fund.

During settlement negotiations, no one represented the absent class members, although in theory, the EEOC should have championed their interests. Both the EEOC and the litigating amicus curiae claimants were more than willing to abandon the absent pilots. Ironically, since the settlement occurred prior to any order on class certification, PAN AM received more from the settlement than it could have obtained from a judgment on the merits which would not have extinguished the absent class members' rights. *See Roberts v. American Airlines, Inc.*, 526 F.2d 757 (7th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976).

It is obvious that the absent pilots' rights, including those of KING's and KEITH's were sold out by parties that simply did not represent them. A court must find a class action settlement fair and adequate to all persons before approving it. *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977).

One hundred and six successful plaintiffs will give up their claims against PAN AM and will divide the entire $17.2 million settlement fund. All 423 of the remaining potential claimants, including KEITH, KING

and the other pilots whose addresses were withheld, are also forfeiting their claims but these similarly aggrieved pilots are precluded from sharing in the fund. KING submits that the settlement is manifestly unfair to him and to all other pilots similarly situated.

V.
CONCLUSION

Appellant MORGAN D. KING respectfully requests that this Court grant KEITH's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. The decision of the Court of Appeals is in direct conflict with the decisions of this Court and with decisions of other United States Court of Appeals on similar matters, and it operates to affirm an unconstitutional and an unconscionable consent decree.

If, in any action, the EEOC's exercise of discretion in fashioning classwide backpay relief is to be upheld, then all claimants with identical claims must be entitled to an equal share of the settlement fund or be free to pursue their private remedies. The Ninth Circuit's conclusion to the contrary is a dangerous class action precedent, and it rewards litigants for not providing basic information to government agencies.

The requirement, established by the Court of Appeals, that absent class members must immediately intervene upon hearing about class litigation should be reversed. Absent class members must have the right to allow the litigation to run its course, content in the knowledge that there are safeguards provided for their

protection. The decision of the Court of Appeals makes those safeguards illusory, is contrary to the spirit of *Hoffman-La Roche v. Sperling, supra,* and encourages future abuse of the class action device.

Accordingly, for all of the foregoing reasons, respondent MORGAN D. KING supports KELVIN H. KEITH and requests that this Court grant a writ of certiorari to the United States Court of Appeal for the Ninth Circuit.

DATED: June 15, 1990.

Respectfully submitted,

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